SERVED: March 9, 1995

NTSB Order No. EA-4327

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of February, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. CHRISTIAN EKREM, Respondent.	Docket SE-13368-RM

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered on August 30, 1994, at the conclusion of a two-day evidentiary hearing.[1] The hearing took place after a remand by the Board for further

[1]An excerpt from the hearing transcript containing the initial decision is attached.

proceedings, NTSB Board Order EA-4187 (1994).[2] The law judge affirmed the Administrator's emergency order[3] of revocation charging respondent with violations of sections 61.59(a)(2), 91.13(a), 135.243(a), 135.244(a)(2), and 135.297(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 61, 91, and 135), and section 610(a)(2) of the Federal Aviation Act of 1958.[4] The order (complaint) alleged that on October 21, 1991, respondent, while employed at Pacific Coast Airlines, Inc. (PCA), acted as pilot-in-command (PIC) of a Piper 31-350, N59919 (a multi-engine aircraft), on a Part 135 scheduled, passenger-carrying flight under Instrument Flight Rules (IFR) from Catalina Island to Los Angeles International Airport (LAX). It is further alleged that respondent knew it was a regularly-scheduled, passenger flight and knew he was not qualified to act as PIC. Yet, despite this knowledge, he intentionally entered false information into the aircraft logbook to make it appear that the flight had been conducted under Part 91 of the FARs. Respondent, however, maintains that he had not been the PIC, and that he had honestly and reasonably believed it was a Part 91 flight. For reasons stated below, we deny respondent's appeal and adopt the findings and conclusions of the law judge as our own.

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[2]In that opinion and order, the Board reversed the decision of Administrative Law Judge Jerrell R. Davis. The law judge had dismissed the matter, finding that the Administrator had failed to establish a prima facie case.

[3]Respondent waived expedited review of the emergency order.

[4]See Appendix for text of the pertinent regulations.

The basic facts are as follows. PCA was a small commuter airline operating under Part 135. On October 21, 1991, PCA's chief pilot, Bill Mitchell, called in sick and did not report for work. He was the only PCA pilot at the time who held an airline transport pilot (ATP) certificate and the only PCA pilot qualified to be PIC of a Part 135 scheduled flight. Therefore, all the scheduled Part 135 passenger-carrying flights had to be canceled, including a flight scheduled to depart Catalina Island at 4:15 p.m.[5] According to the PCA reservations clerk, it was her duty to inform all passengers scheduled to fly PCA on October 21 or the next several days that the flights had been canceled. (Ex. R-23.) She was unable, however, to contact the three passengers who had tickets to return from Catalina Island that afternoon.

Meanwhile, respondent had come into the office to take care of some paperwork. He testified that when he arrived, another PCA pilot, Constance Miller, asked if he would like to go with her on a flight from Orange County, to Catalina, to LAX, and then back to Orange County.[6] It is undisputed that both respondent and Miller were qualified to act as SIC, not PIC, of a scheduled

[5]As stated on the invoice for the tickets, PCA Flight 412 was scheduled to depart Catalina Island on October 21, 1991, at 4:15 p.m. and arrive at LAX at 4:45 p.m. (Exhibit (Ex.) C-3.)

[6]Originally, Ms. Miller had reported for work as second-in-command (SIC) for Flight 412.

IFR flight operated under Part 135.[7] Respondent stated that when he questioned the nature of the flight, Miller and others in the office told him it was a nonrevenue, nonscheduled flight operated under Part 91. (Tr. II at 84-85.) Both respondent and Miller were qualified to be PIC of a Part 91 flight. Respondent testified that he did not discuss the flight with the owner of PCA, Carl Strombitski. (Tr. at 82-83.)

Constance Miller testified that Mr. Strombitski directed respondent and her to take the flight, with respondent as PIC because he had more flight time. Strombitski further instructed them to make sure their departure and arrival times varied from the scheduled times, and not to take the passengers' tickets until after landing at LAX.[8] (Tr. I at 551-54.) They arrived at Catalina Airport about 4:15 p.m., picked up three passengers and reported to the UNICOM operator that they were departing with three revenue passengers.[9] (Ex. C-8, C-9.)

Respondent filled out the PCA Aircraft Flight and Maintenance Log for the aircraft, listing himself as PIC and Miller as SIC, and describing it as a Part 91 flight. (Ex. C-1,

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[7]Each was also qualified as VFR captain for Part 135 charters. (Tr. I at 46.) (Citations to "Tr. I" refer to the hearing that took place on February 3-4, 1994; "Tr. II" refers to the hearing following remand, August 29-30, 1994.)

[8]Ms. Miller stated that, at the time, she and respondent believed that if they did not take the passengers' tickets, it would be a Part 91 flight. (Tr. I at 599-605.)

[9]According to the airport manager, the airport maintains a record of the number of revenue passengers that are flown into and out of Catalina Airport.

R-24.) There is a discrepancy over whether this entry (comprising one page of the logbook), admittedly made by respondent, is the first or the third version of the entry. The Administrator asserts that it is the third. As alleged by the Administrator, the first version indicated that the aircraft was operated under Part 135 from Catalina to LAX, but the second version was redone on October 25 by Mitchell, at Strombitski's request, to show that the flight was operated under Part 91.[10] Versions one and two presumably were destroyed. (Tr. I at 49-53.)

Respondent, however, maintains there were only two different entries, not three. He claims that the entry introduced into evidence (Ex. C-1, R-24) is both the first and the third version, and that the copy made by Mitchell is the second. Yet, according to Bill Mitchell's testimony, the first version of the logbook page identified the flight as number 412, listed an ILS approach and a half hour of IFR for each pilot, and was signed by respondent. This information does not appear on Exhibit C-1, R-24.

In the initial decision, the law judge found the following: 1) the flight from Catalina to LAX was operated under Part 135, on an IFR flight plan; 2) respondent was the PIC of the flight operation; 3) neither respondent nor Constance Miller was qualified to make the flight as PIC; 4) when he accepted the

[10]This request was made after FAA inspector John Goldfluss indicated that he would be at PCA that day to perform a base inspection.

flight, respondent was aware that three fare-paying passengers were at Catalina Airport, and that he and Ms. Miller were to pick them up close to the scheduled flight time; 5) respondent intentionally falsified the original entry in the flight log, after learning there was a question about the legality of the flight, to conceal the fact that the flight had been operated as a Part 135 flight; and 6) respondent acted in a reckless manner, potentially endangering the lives or property of others, by deliberately participating in a ruse to operate a 135 flight without a qualified pilot.

Before discussing the substantive issues of respondent's appeal, we first must address the Administrator's Motion to Strike. In his appeal brief, respondent made several references to the transcript of a prior hearing involving PCA.[11] The Administrator now asks the Board to strike the statements "that are supported exclusively by a citation to the PCA hearing transcript that is not in evidence." Administrator's Amended Motion to Strike at 1. In his Opposition to the Administrator's Motion, respondent asserted that, clearly, Law Judge Geraghty read the PCA transcript in preparation for respondent's hearing, since he stated he had read all the transcripts of the prior proceedings. We disagree with this interpretation of the law judge's statement. Rather, our review of the record in the

[11]PCA's operating certificate was revoked pursuant to an emergency order on September 15, 1993. The order was affirmed on October 20, 1993, following a three-day hearing where, among other things, the circumstances of the flight at issue in respondent's case were discussed.

instant case reveals that Law Judge Geraghty said, in the context of a discussion of testimony from respondent's first hearing, "I would note for the record, I have read all of the transcripts on the prior proceeding." (Tr. II at 6.) The law judge again made a reference to respondent's first hearing, stating "I have read through the transcript. The transcript was somewhat confusing because I think there was a lot of extraneous material." Id. at 10. It seems evident that he is referring to the transcript volumes from respondent's first hearing, not the PCA hearing.[12]

Contrary to respondent's assertion, the entire PCA transcript is not per se part of the record in the instant case. The PCA hearing was a completely separate proceeding which occurred before the emergency order of revocation was issued to respondent.[13] We therefore agree that the references to the PCA transcript are improper, except for sections that were specifically admitted into evidence at the hearing, and grant the Administrator's motion.

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[12]Respondent further argues that "[t]he best evidence of the credibility of those witnesses [whom Law Judge Geraghty did not hear testify] is a comparison of their 'former testimony' in the PCA case with their testimony in the instant case." Respondent's Opposition to Motion to Strike at 3. If this is something which respondent deemed of value to his case, then the comparison should have been accomplished at the hearing by offering the pertinent sections of the PCA transcript into evidence.

[13]Section 821.40 of the Board's Rules of Practice states that "[t]he transcript of testimony and exhibits, together with all papers, requests, and rulings filed in the proceeding shall constitute the exclusive record of the proceeding." 49 C.F.R. Part 821.

Regarding his appeal, respondent argues that his case was prejudiced because the law judge on remand imposed a stricter standard for the admission of evidence than the law judge who presided at the first hearing during the presentation of the Administrator's case-in-chief. We disagree. Law Judge Geraghty advised respondent at the start of the hearing after remand that the transcript of the first hearing was replete with "extraneous material," and the admission of cumulative evidence or irrelevant testimony would not be allowed.[14] Respondent voiced no objection and, certainly, the law judge's requirement that the evidence be relevant to the issues at hand cannot be faulted. In any event, there is no indication in the record or the initial decision that the law judge utilized, to support his decision, any evidence from the first hearing that was improperly admitted and

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[14]Specifically, the law judge stated, "I follow the Board's Rules of Practice, I follow the Federal Rules of Evidence, as modified by Board precedent and administrative procedure, which is essentially a hearsay rule. Now I intend to stick to that and I am not going to listen to irrelevant testimony or cumulative evidence." (Tr. II at 10.)

Regarding his evaluation of hearsay evidence, the law judge said that he would receive reasonable hearsay into evidence "subject to weight to be attached." (Tr. II at 66.) He further explained:

> A witness'[s] statement is better than oral hearsay.... A sworn statement before a Notary Public, I give more credit than a statement that's just written out and signed because the person at least swore to it. A deposition, of course, is under oath, same as the witnesses here, and live testimony, and that's the way I go.... [A]nd double hearsay, I will not receive, because [] there's no way I can judge that.

Id. at 67.

respondent has not specifically identified any ruling that he believes may have prejudiced his case. Indeed, as far as we can discern, Law Judge Geraghty, who amply supported his conclusions with citations to the record, weighed the testimony and evidence received at both hearings under the same standard.[15]

Expanding his argument, respondent asserts that the record does not support the law judge's decision and that Law Judge Geraghty's credibility assessments differ "dramatically" from those made by Law Judge Davis. After review of the record and the initial decision, we believe the law judge thoroughly considered the evidence before him. The evidence was more than sufficient to show that respondent did not have an ATP certificate on October 21, 1991, and was qualified only as SIC on a scheduled, Part 135 flight under IFR, thus establishing the violations of FAR sections 135.243(a) and 135.297(a). (Tr. I at 63, 286-87, 428; Ex. C-10, R-18.) While the only support offered by the Administrator for the 135.244(a)(2) charge regarding operating experience was the testimony of FAA Inspector Goldfluss, we think this testimony, presumably based on his knowledge of the carrier's training records, was sufficient.[16]

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[15]In addition, the evidence was evaluated "not by jurors with little or no experience in the weighing of evidence, but by an administrative law judge experienced in discriminating between the credible and incredible, between trustworthy and untrustworthy evidence." Administrator v. Repacholi, NTSB Order No. EA-3888 at 3 (1993).

[16]Inspector Goldfluss, who was PCA's principal operations inspector, stated that respondent had not completed the necessary experience requirements. (Tr. I at 429.)

In this connection we note that respondent, aside from testifying that he had more than 50 hours of flight time in that type of aircraft and was rated in that aircraft (Tr. II at 166), did not substantiate his testimony or offer any reliable evidence, such as a logbook, to show that the inspector's assessment was wrong. Under these circumstances, we cannot find that the law judge, who appears to have credited the inspector's testimony over the respondent's, erred in upholding this charge. In any event, it has no bearing on the outcome of the case, as a finding of intentional falsification alone warrants revocation.

The crucial issues in the instant case rest on credibility determinations and evidence comparisons, as the testimony of several witnesses is irreconcilable. For example, Constance Miller testified that she and respondent were instructed by PCA's owner to pick up the passengers but not to take their tickets until arrival at LAX, and that respondent operated the flight from Catalina Island to LAX on an IFR flight plan; Bill Mitchell testified that he spoke with Ms. Miller and respondent, who stated that the owner threatened to fire them if they did not take the flight; and the Catalina Airport manager stated that N59919 picked up three revenue passengers on October 21.

By contrast, according to respondent's testimony, he did not speak to the owner and was not ordered to take the flight; he was told by the personnel in the office and by Constance Miller that the flight was a nonrevenue, unscheduled, Part 91 flight; he could not remember discussing tickets with Ms. Miller; though he

filled out and signed the aircraft log as PIC, Ms. Miller "was responsible for the flight";[17] he could not recall if they had filed an IFR flight plan for the flight to LAX; and Miller flew any ILS approaches. Plainly, in order to render a decision, the law judge was required to assess credibility and compare the probative value of the evidence introduced by both parties.[18] The law judge reviewed the transcript of the first hearing where the Administrator's case-in-chief was presented, listened to the testimony of respondent and others at the hearing on remand, and determined that the Administrator proved by a preponderance of the evidence that respondent made an intentionally false entry in the aircraft flight log.[19] Respondent has neither shown error in the manner in which the law judge weighed and evaluated the evidence, nor demonstrated any basis for overturning his credibility choices.

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[17]Under cross-examination, respondent summarized what he told an FAA inspector in an interview about the October 21 flight: "I think I told him I was manipulating the controls and I interpret that as pilot-in-command, but I still think that Constance Miller was responsible for the flight." (Tr. II at 152.) Later, respondent's counsel stated that respondent had already admitted that he was pilot-in-command, even though he may have had misgivings about it at the time. (Tr. II at 154.)

[18]Credibility determinations will not be disturbed absent a showing that they are arbitrary, capricious, or yield a result inconsistent with the overwhelming weight of the evidence. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

[19]The elements of intentional falsification are 1) a false statement; 2) in reference to a material fact; 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

Therefore, we find that respondent has not established any error in the initial decision and adopt the findings and conclusions of the law judge as our own.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The Administrator's order and the initial decision are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

APPENDIX

§ 61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made-

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance or exercise of the privileges, or any certificate or rating under this part.

§ 91.13 **Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 135.243 **Pilot in command qualifications.**

(a) No certificate holder may use a person, nor may any person serve, as pilot in command in passenger-carrying operations of a turbojet airplane, of an airplane having a passenger seating configuration, excluding any pilot seat, of 10 seats or more, or a multiengine airplane being operated by the "Commuter Air Carrier"..., unless that person holds an airline transport pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that airplane.

§ 135.244 **Operating experience.**

(a) No certificate holder may use any person, nor may any person serve, as a pilot in command of an aircraft operated by a Commuter Air Carrier... in passenger-carrying operations, unless that person has completed, prior to designation as pilot in command, on that make and basic model aircraft and in that crewmember position, the following operating experience in each make and basic model of aircraft to be flown:

* * * *

(2) Aircraft multiengine, reciprocating engine-powered - 15 hours.

§ 135.297 **Pilot in command: Instrument proficiency check requirements.**

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

§ 610 of the Federal Aviation Act of 1958.

(a) It shall be unlawful -

* * * *

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title.